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June 16, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Re: MM Docket No. 98-43

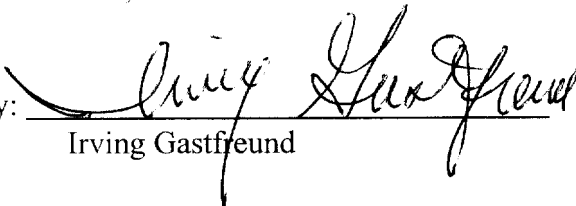
Dear Ms. Salas:

Submitted herewith for filing are an original and nine copies of the Joint Comments of Radio & Records, Radio Business Report, Duncan's American Radio, LLC, & Dataworld, in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER, LLP

By:   
Irving Gastfreund

Enclosure.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN 16 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
1998 Biennial Regulatory Review -- ) MM Docket No. 98-43  
Streamlining of Mass Media Applications, Rules )  
and Processes )

TO: The Commission

JOINT COMMENTS OF  
RADIO & RECORDS, RADIO BUSINESS REPORT,  
DUNCAN'S AMERICAN RADIO, LLC, AND DATAWORLD

RADIO & RECORDS, RADIO BUSINESS REPORT, DUNCAN'S AMERICAN RADIO, LLC, and DATAWORLD (hereinafter collectively "Commenting Parties"), by their attorneys, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby jointly submit their instant Comments in response to the Commission's Notice of Proposed Rule Making in MM Docket No. 98-43, \_\_\_ FCC Rcd \_\_\_, FCC 98-57 (released April 3, 1998) (hereinafter "NPRM") in the above-captioned proceeding.<sup>1</sup> In support whereof, it is shown as follows:

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<sup>1</sup> A summary of the Commission's NPRM in this proceeding was published in the Federal Register on Friday, April 17, 1998. See 63 Fed. Reg. 19226 (April 17, 1998). Moreover, that summary stated that comments in this proceeding must be filed with the Commission by June 16, 1998 -- i.e., 60 days following the date of publication in the Federal Register. Accordingly, the submission of the instant Comments to the Commission is timely.

## **I. Introduction**

In its NPRM, the Commission instituted a rulemaking proceeding to consider fundamental changes in its broadcast application and licensing procedures. The Commission stated that its goals were to reduce applicant and licensee burdens, to attempt to realize fully the benefits of the Mass Media Bureau's electronic filing initiative, and to preserve the public's ability to participate fully in the Commission's broadcast licensing processes. NPRM, slip op. 1, ¶1. The Commission further stated that its proposals were predicated on its belief that it could prudently increase reliance on applicant certifications rather than relying on more detailed applicant informational disclosures. Id. The Commission stated that its proposals in the proceeding were designed to reduce filing burdens and to increase the efficiency of application processing by the Commission. Id. However, the Commission expressly recognized that this approach would be feasible only if the Commission were to retain the capacity to verify compliance with the Commission's Rules and the accuracy of information submitted in applications.

More specifically, the Commission has proposed electronic filing for 15 key Mass Media Bureau broadcast application and reporting forms. Id. at ¶¶5 et seq. The Commission has further proposed to substantially revise those forms to facilitate electronic filing and processing by replacing narrative exhibits with questions and certifications which could be answered with a "yes" or a "no" response. Id. at ¶2. The Commission stated its belief that expanded application instructions, new worksheets and revised forms would prove less burdensome to applicants. Id.

In connection with its review of the Mass Media Bureau's processing practices, the Commission proposed, in its NPRM, to eliminate completely the present requirement that sales contracts and/or agreements be filed as part of each application for Commission consent to a proposed assignment of license or transfer of control and to eliminate, as well, the part of Section 73.3613(b) of the Commission's Rules which presently requires that such agreements be filed with the Commission within 30 days following the date of execution. NPRM, ¶31.

In issuing these proposals, the Commission stated that it could achieve significant savings in resources if it could rely on the certifications by applicants concerning the contents of sales agreements rather than relying on a direct review of the agreements in question. Id. at ¶32. However, the Commission also recognized that any processing changes that it adopts must not impede the agency's ability to discharge its obligation, under Section 310(d) of the Communications Act, to grant only those applications which serve the public interest, convenience and necessity. Id. Moreover, the Commission recognized that any proposed changes must preserve the public's ability to monitor and participate in the consideration of sales applications. Id.

Consequently, in lieu of the present requirement that applicants file sales agreements with an assignment or transfer application, the Commission is proposing to require applicants to review their sales and organizational documents against new instructions to FCC Forms 314 and 315. Applicants would be required to disclose fully all sales, financing and investor information where the transaction or the assignee or transferee entity does not conform fully to applicable Commission policies. Id. However, the Commission stated that it may request copies of sales agreements on a

case-by-case basis where disclosures which are made in an assignment or transfer application raise issues or concerns.<sup>2</sup> *Id.* at ¶32. The Commission consequently sought comment on whether its proposed procedures would suffice instead of the present requirement that applicants file copies of sales agreements with their assignment and transfer applications. *Id.* Significantly, the Commission stated, in its NPRM that, if it were to eliminate the requirement that applicants file copies of sales agreements with their assignment and transfer applications and eliminate the rule requiring that such agreements be filed with the Commission within 30 days of execution, the Commission nonetheless proposes to require that applicants place copies of all such agreements in the applicable station's local public inspection file. *Id.* at ¶33. The Commission also sought comment on the impact of its proposal to end the practice of having copies of sales agreements available for inspection in the Commission's Public Reference Room in its Washington, D.C., offices. *Id.*

## **II. Interest of the Commenting Parties in This Proceeding**

Radio & Records and Radio Business Report are among the nation's most well-known and well-respected trade publications for the broadcasting industry. Each week, these two publications report on a variety of matters of particular interest to radio broadcasters, including information relating to sales of radio stations, as well as information as to the sales prices of stations, or, as the

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<sup>2</sup> In this connection, Section 1.17 of the Commission's Rules provides, in pertinent part, as follows:

"The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission."

case may be, the consideration to be paid for the transfer of control of one or more broadcast licensees. Such information is presently obtained from copies of applications filed with the Commission which seek consent to the assignment of license or transfer of control of broadcast stations (FCC Forms 314 and 315).

Duncan's American Radio, LLC, is the publisher of Duncan's Radio Market Guide, which is one of the most important sourcebooks on the radio broadcasting industry in the United States. Duncan's reports on demographic and financial information concerning radio stations, including sales information.

Dataworld is a data research company which maintains a data base about the radio broadcasting industry. Dataworld is presently in the process of implementing a data base regarding station sales, and it presently obtains copies of certain assignment and transfer applications in connection with discrete research commissioned by specific clients.

In light of the foregoing, the Commenting Parties each have a direct, substantial, and immediate interest in the resolution by the Commission of its proposal to eliminate the necessity for the filing of sales agreements with the Commission. As shown below, if this present filing requirement were eliminated, no significant regulatory burden would be correspondingly eliminated; however, as shown below, the adoption of the Commission's proposal would seriously undermine the paramount public interest and significantly lessen not only the availability of information about comparable station sales, but also accessibility of potential funding for sales transactions for the

broadcast industry. In short, the Commission's proposal would actually harm the very broadcast industry that the Commission hopes to assist. As shown below, the public interest requires that the Commission continue its present policy of insisting on the submission of unredacted sales agreements with assignment and transfer applications.

### **III. Argument**

Paragraph 4 of Part I of Section I of FCC Form 314 (Application for Consent to Assignment of Broadcasting Station Construction Permit Or License) specifically requires the proposed Assignor to attach, as an exhibit to the application, a complete copy of the contract or agreement to assign the property or facilities of the station. In addition, Paragraph 4 of Part I of Section I of FCC Form 314 presently requires that, if the agreement is only oral, the terms must be reduced to writing and thereupon submitted with the assignment application. Analogous requirements are established in Paragraph 4 of Part I of Section I of FCC Form 315 (Application For Consent to Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License). Moreover, Paragraph 2 of Part II of Section I of FCC Form 314 and Paragraph II of Part III of Section I of FCC Form 315 require the prospective assignee or transferee to confirm that the copy of the contract submitted by the assignor or transferor embodies the full and complete agreement between the parties. For a number of years it has been informal Commission policy -- adopted as a result of a directive from former Commission Chairman Mark Fowler -- to require parties to broadcast assignment or transfer applications to disclose, in such applications, the sales prices of the stations to be sold, or, as the case may be, the consideration to be paid for the transfer of control. In prior litigation before the Commission over the years, in connection with assignment and transfer applications, certain

applicants for Commission consent to sales transactions had either not filed copies of sales agreements or had redacted sales price information.

In such litigation, Radio & Records established that the purchase price or consideration specified in an asset purchase agreement or stock public agreement or similar agreement, in pertinent ancillary or "side agreements" or in applicable "letters of intent", is a material term, and that, accordingly, such sales price information is required to be disclosed under the requirements of FCC Forms 314 and 315. It should be noted, in this connection, that, under Section 73.3514(a) of the Commission's Rules, each application must include all information called for by the particular form on which the application is required to be filed, unless, of course, the information called for is inapplicable.

As the outgrowth of the litigation referred to above, at the urging of Radio & Records, the Commission established that the submission of sales price information in connection with assignment and transfer application is required in the paramount public interest. Accordingly, the Mass Media Bureau's policy over the years has been to require parties to assignment and transfer applications to supply complete, unredacted copies of asset purchase agreements or stock purchase agreements, as well as any other agreements, "side letters" or other documents which memorialize any and all understandings among the parties to the application, as to the specific dollar amount of the consideration to be paid to the assignor or transferor or to any parties in privity with, or common control with it, or controlling it. It has thus been established Commission policy for many years that, unless and until such unredacted sales and other agreements are supplied to the Commission, and



unless and until sufficient copies are filed with the Commission to enable the agency to place such copies in its Public Reference Room in Washington, D.C., for public inspection, an assignment or transfer application is not "substantially complete", within the meaning of Section 73.3564(a) of the Commission's Rules, and is therefore not entitled to Commission processing and grant.

In this connection, it has long been established Commission policy that, unless a complete, unredacted copy of a sales agreement and of all other ancillary agreements are made publicly available, the public's right to know such information would be materially impaired, and the public's right to participate in the licensing process, pursuant to Section 309 of the Communications Act and applicable Commission Rules, would be rendered meaningless.

It is against this background that the Commission must assess its proposal to delete the contract filing requirement. Although the Commenting Parties applaud the Commission's proposal to implement electronic filing procedures, the proposed deletion of the contract filing requirement would be antithetical to the public interest.

As established under existing Commission policy, the public has a right to know the dollar value assigned to broadcast spectrum which is a scarce resource belonging to the public. Correspondingly, Congress, the Commission, and broadcasters themselves have a right to know the value of broadcast spectrum in connection with auctions of broadcast facilities under the competitive bidding procedures of the Communications Act and the Commissions's Rules and policies. Furthermore, accurate information as to comparable station sales is required in order to ensure

accuracy in implementation of the Commission's minority distress policy. See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978). It should be noted that accurate pricing information is absolutely critical to the Commission's distress sale process, which is the only remaining program to encourage minority ownership of broadcast stations. Under the distress sale policy, a broadcaster facing substantial and material questions of fact as to character qualifications issues is allowed to sell its broadcast property to a minority-controlled entity at a percentage of fair market value.

Moreover, elimination by the Commission of the requirement that station sales agreements must be filed with the agency in Washington will necessarily result in non-availability of information concerning station sales, thereby depriving broadcasters, media brokers and, importantly, broadcast lenders of information concerning comparable sales. Without access to such information, capital sources will be unable to assess the value of a broadcast station, nor will media brokers have access to such comparable sales data. Without such information, it is quite likely that the availability of capital for broadcast transactions -- particularly for minority group members and women -- will significantly evaporate.

The Commission itself has initiated a rulemaking proceeding on the possible means for reducing unnecessary regulatory constraints on investment in the broadcast industry, in order to enhance the availability of capital for broadcast transactions. See Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, 7 FCC Rcd 2654 (1992). The Commission there recognized that the broadcast industry is a cornerstone of American

commerce and, therefore, has substantial effects on the other parts of the United States economy. For this reason, the Commission found it vitally important that its regulatory programs be as minimally burdensome on investment in the industry as possible, consistent with the Commission's statutory mandate under the Communications Act. *Id.* Consequently, the Commission is exploring possible changes in the Commission's Rules and policies which could increase and facilitate the availability of capital for investments in the broadcasting industry. *Id.*<sup>3</sup>

It is particularly ironic that the Commission should be actively exploring ways of enhancing the availability of capital for broadcasting transactions while at the same time proposing to eliminate the availability to broadcast lenders of data on sales of stations that would yield information about comparable sales. Without such information, lenders will be extremely reluctant to invest sizeable sums in broadcasting transactions, particularly where the bulk of the price of a broadcast sale is attributable to intangibles (such as good will), rather than to tangible assets. If the Commission is, indeed, firmly committed to enhanced capital availability to finance broadcast acquisitions, particularly by minority group members and women, the Commission should eschew deletion of the contract filing requirement which is presently a part of the Commission's regulatory requirements.

Should the Commission adopt its proposal to delete the contract filing requirement, chaos will be created in what is now a rather orderly marketplace for broadcast properties, thereby hurting

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<sup>3</sup> Similarly, in Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 12 FCC Rcd 16802 (1997), the Commission found that "... the predominant impediment to entry [into the broadcasting industry] ... is access to and cost of capital." *Id.* at 16920, ¶215.

broadcasters by making it more difficult to track changing pricing trends for broadcast stations. Such information is now available from trade publications and data bases, such as those which are produced by some of the Commenting Parties. Moreover, media brokers will also find it much more difficult to provide accurate, up-to-date information to clients on values of broadcasting stations if the Commission were to adopt its proposal, since the trade press will no longer be able to be aware of station sales prices without access to the underlying contracts. Media lenders who are unable to have access to information about comparable sales figures will necessarily either avoid lending for media transactions or may require more equity infusion in broadcast transactions or may require that such transactions be fully secured with readily marketable assets, or by charging higher loan rates. Any or all of these results would be antithetical to the needs of the broadcasting industry and to the clear policy goals of the Commission.

The Commission has a statutory obligation, under Section 310 of the Communications Act, to review sales agreements and other agreements involving the broadcasting industry for compliance with applicable Commission policies. It is highly unlikely that the Commission will ever be able to come up with a definitive "check list" that covers each and every item as to which a broadcaster would be asked to certify compliance. Even if such an approach were utilized by the Commission, the reliance on self-certification and applicant "check lists" necessarily rests on the assumption that a broadcast applicant fully comprehends all of the intricacies inherent in applicable Commission policies, including complex policies relating to multiple ownership, reversionary interests, etc. If the Commission were to now rely exclusively on such self-certification and expanded "check lists",

the opportunity for accurate independent review of proposed sales transactions would be significantly eviscerated.

In short, the Commission's proposed elimination of its contract filing requirement will significantly and adversely affect the very broadcast industry which the Commission is attempting to assist. Yet, there is no rational basis for the Commission's apparent assumption that the mere act of filing of a broadcast sales agreement with an assignment or transfer application would create an added regulatory burden on a broadcast applicant. It must be recognized, in this regard, that virtually all broadcast sales agreements are created on computers or word processors these days. Hence, if the Commission were to implement its electronic filing proposal, all that would be needed for the filing of a broadcast sales agreement with the Commission is simply to "click" with a mouse on an icon for the word processing file so as to attach the file to the electronically filed FCC Form 314 or Form 315. Even if a formal print-out of a sales agreement were required, such a print-out certainly cannot be said to impose any substantial or material regulatory burden on an applicant for consent to the sale of a broadcast station.

Moreover, if, in fact, the Commission were correct in its view that no useful regulatory purpose would be served by the submission of the applicable sales agreement to the agency or by scrutiny of the agreement, then it is open to serious question why the Commission nonetheless proposes to obligate broadcast applicants to place copies of such agreements in the local public inspection files of the applicable stations. Obviously, the Commission itself must recognize the value of such agreements to the public and others in relation to public participation in the regulatory

process. If the sales agreement information is, indeed, useful (which it is), then there is no rational basis for the Commission's proposal to modify its policies to require that copies of sales agreements be placed only in the station's local public inspection file. Under Section 73.3526(d) of the Commission's Rules, the local public inspection file is required to be maintained in the station's community of license. Plainly, neither the Commenting Parties nor any other members of the trade press or of the general public are likely to send representatives to the respective local public inspection files of each station which is the subject of an assignment or transfer application, merely to retrieve copies of sales agreements. Stated otherwise, by requiring the placement of a sales agreement in a station's local public inspection file, the information from such an agreement may be available to the public, but it is nonetheless impossible, pragmatically, for that information to be utilized by the trade press and others and to be put into a useful form. The Commission's local public inspection file proposal would essentially require that, rather than having sales agreements available at a central point in Washington, D.C., as is presently required, sales agreements would be scattered across all 50 states and the District of Columbia. Such a policy has no rational basis.

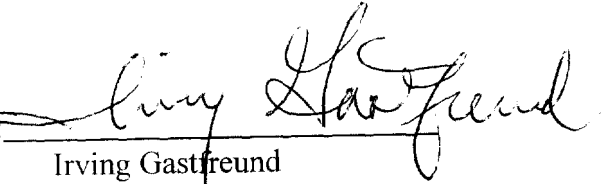
#### **IV. Conclusion**

In light of all the foregoing, the Commenting Parties respectfully submit that adoption by the Commission of its modified proposal concerning the filing of sales agreements will likely significantly harm the broadcast industry while not relieving that industry from any material regulatory burdens. The Commenting Parties therefore respectfully urge the Commission to retain

its existing policy of requiring submission to the Commission of complete, unredacted copies of sales agreements as part of all assignment and transfer applications.

Respectfully submitted,

RADIO & RECORDS,  
RADIO BUSINESS REPORT  
DUNCAN'S AMERICAN RADIO, LLC and  
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June 16, 1998

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Summary

The Commenting Parties each have a direct, substantial and immediate interest in the resolution by the Commission of its proposal to eliminate the necessity for the filing of sales agreements with the Commission. If this present filing requirement were eliminated, no significant regulatory burden would be correspondingly eliminated; however, the adoption of the Commission's proposal would seriously undermine the paramount public interest and significantly lessen not only the availability of information about comparable station sales, but also accessibility of potential funding for sales transactions for the broadcast industry. Hence, the Commission's proposal would actually harm the very broadcast industry that the Commission hopes to assist. The public interest requires that the Commission continue its present policy of insisting on the submission of unredacted sales agreements with assignment and transfer applications.